

K23HPARC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 725 (JPO)

5 LEV PARNAS, IGOR FRUMAN, DAVID  
6 CORREIA, AND ANDREY KUKUSHKIN,

Conference

7 Defendants.

-----x

8 New York, N.Y.  
9 February 3, 2020  
2:10 p.m.

10 Before:

11 HON. J. PAUL OETKEN,

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

United States Attorney for the  
15 Southern District of New York

16 NICOLAS L. ROOS

REBEKAH A. DONALESKI

DOUGLAS S. ZOLKIND

17 Assistant United States Attorneys

18 JOSEPH A. BONDY

STEPHANIE SCHUMAN

19 Attorneys for Defendant Parnas

20 TODD BLANCHE

Attorney for Defendant Fruman

21 WILLIAM JOSEPH HARRINGTON

JEFFREY MARCUS

22 Attorneys for Defendant Correia

23 GERALD LEFCOURT

24 FAITH FRIEDMAN

25 Attorneys for Defendant Fruman

K23HPARC

(Case called)

MR. ROOS: Good afternoon, your Honor. Nicolas Roos, Rebekah Donaleski, and Douglas Zolkind, for the United States.

THE COURT: Good afternoon.

MR. BONDY: Joseph Bondy and Stephanie Schuman on behalf of Mr. Parnas, who is present today.

THE COURT: Good afternoon.

MR. BLANCHE: Good afternoon, your Honor. Todd Blanche on behalf of Igor Fruman. Pursuant to your Honor's orders last Thursday, I discussed what we hope to accomplish today, and he waives his appearance.

THE COURT: Thank you.

MR. HARRINGTON: Good afternoon, your Honor. Bill Harrington and Jeff Marcus for David Correia. Mr. Correia also waives his appearance today. We've updated him on the status of the case.

MR. LEFCOURT: Good afternoon, your Honor. Gerald Lefcourt and Faith Friedman. As I indicated last week, Mr. Kukushkin waives his appearance.

THE COURT: Good afternoon. Thank you.

I scheduled this conference in December for today, and I'd like to cover a few things. First of all, the letter motion filed by counsel for Mr. Kukushkin on the issue of surveillance under 18 U.S.C. Section 3504, which I intend to rule on today; second, the status of discovery; and third,

K23HPARC

1 scheduling of any pretrial motions and scheduling the trial,  
2 which I'm hopeful we can get on the calendar today. And then  
3 finally, any other issues the parties wish to address.

4 Let me just ask, are there any other preliminary  
5 matters anyone wants to raise before I proceed to the first of  
6 those?

7 All right. On December 12, 2019, counsel for  
8 Mr. Kukushkin filed a letter motion on behalf of all defendants  
9 requesting that I order the government to affirm or deny  
10 whether defendants' communications have been intercepted by any  
11 government agencies pursuant to 18 U.S.C. Section 3504. You  
12 filed a letter citing supplemental authority on December 19,  
13 the government filed its response on January 3, and  
14 Mr. Kukushkin filed a reply submission on January 9. I've  
15 reviewed the parties' submissions and the relevant authorities,  
16 and I'm prepared to rule.

17 Section 3504 provides that "In any trial, hearing, or  
18 other proceeding in or before any court upon a claim by a party  
19 aggrieved, that evidence is inadmissible because it is the  
20 primary product of an unlawful act or because it was obtained  
21 by the exploitation of an unlawful act, the opponent of the  
22 claim shall affirm or deny the occurrence of the alleged  
23 unlawful act." The government has represented that it did not  
24 obtain or use any Title III intercepts in this investigation.  
25 The government also represents that it does not intend in this

K23HPARC

1 case to use any information obtained or derived from other  
2 forms of surveillance, i.e., under FISA, the Foreign  
3 Intelligence Surveillance Act, or under Executive Order 12333.

4 Defendants contend that despite the government's  
5 representation, they are entitled under Section 3504 to have  
6 the government inquire of other federal agencies and affirm or  
7 deny whether their communications have been intercepted under  
8 FISA or otherwise. Defendants emphasize the issue of  
9 widespread covert surveillance by federal agencies and  
10 highlight the potential for abuse from such surveillance. They  
11 argue they are "aggrieved parties" with a claim of unlawful  
12 surveillance under Section 3504 because such evidence -- such  
13 surveillance, even though the government will not use it in  
14 this case, may have been used to derive other evidence  
15 presented to the grand jury or to be used at trial such that it  
16 could be fruit the poisonous agree under Fourth Amendment  
17 doctrine.

18 With respect to FISA, I conclude that the defendant's  
19 request is actually governed by a different provision, 50  
20 United States Code, Section 1806. As the Court held in *United*  
21 *States v. Aziz*, 228 F.Supp.3d 363, 370 (M.D.Pa. 2017): "FISA's  
22 particularized notice disclosure and suppression procedures  
23 supplant the requirements of Section 3504." This conclusion  
24 seems correct to me, particularly in light of the fact that  
25 FISA was enacted in 1978, eight years after the enactment of

K23HPARC

1 Section 3504. There's no basis here to find a violation of  
2 FISA's notice requirements.

3 In any event, with respect to both FISA and Executive  
4 Order 12333, I conclude that the defendants have not  
5 established a colorable basis for believing that they have been  
6 aggrieved by any unlawful surveillance. First, I will assume  
7 that defendants' request is not untimely. Although the case  
8 law is not entirely clear on the proper timing for seeking  
9 relief under Section 3504 and what "proceedings are covered by  
10 the statute," I think it is plausible that the statute  
11 contemplates a motion being brought in advance of trial when  
12 filed by a criminal defendant. A motion under Section 3504 is  
13 closely connected to a motion to suppress, and we are  
14 essentially at the point in this case where we're scheduling  
15 such motions. Moreover, if a defendant files such a motion on  
16 the eve of trial, there is a risk that it would be considered  
17 untimely, as in *United States v. Yanagita*, 552 F.2d 940 (2d  
18 Cir. 1977). On the merits, however, the Second Circuit has  
19 made clear that an assertion of unlawful surveillance based on  
20 mere speculation is insufficient to trigger the government's  
21 duty to respond under Section 3504. Rather, as the Second  
22 Circuit has held, "It is now established that a claim of  
23 unlawful surveillance must have at least a colorable basis  
24 before the government will be obliged to respond." *United*  
25 *States v. James*, 609 F.2d 36, 51 (2d Cir. 1979).

K23HPARC

1           Here, I find that the defendants have not established  
2 a colorable basis to believe that any of them have been  
3 subjected to unlawful surveillance. The defendants rely on  
4 circumstantial facts of this case, including the fact that it  
5 involves foreign communications, foreign nationals, and  
6 political contributions. However, I find that those facts did  
7 not establish a colorable basis beyond speculation to believe  
8 that the defendants were aggrieved by unlawful surveillance.  
9 Those are facts that are not outside the norm in cases in this  
10 district, and I find that the claim here is similar to those in  
11 which courts have not found a duty to respond under  
12 Section 3504, including Judge Ramos in *United States v. Gammal*,  
13 No. 15 Cr. 588; Judge Engelmayer in *United States v.*  
14 *Alimehmeti*, No. 16 Cr. 398; and the Second Circuit in *James*;  
15 *United States v. Pacella*; *United States v. Dien*; and *United*  
16 *States v. Aref*. The motion is therefore denied. However, this  
17 denial is without prejudice to renewal in the event that a  
18 colorable basis for relief emerges based on a further showing.

19           I'd now like to begin by asking counsel for the  
20 government about discovery. At our last conference in  
21 December, you all provided the categories of discovery and  
22 indicated that it was fairly voluminous, and if you could,  
23 please give me an update on the status of production to the  
24 defendants.

25           MR. ROOS: Certainly, your Honor. So discovery, to

K23HPARC

1 date the government's produced approximately 197,000 pages of  
2 Bates-stamped discovery. The number is underinclusive because  
3 there are certain native files that were produced without Bates  
4 stamping, and there are also documents that were obtained from  
5 third parties that did their own Bates stamping, and those  
6 Bates stamp numbers are not included within the government's  
7 range. I give that to your Honor largely to give you a sense  
8 of the volume of the stamped discovery.

9 There's also a good volume of electronic discovery  
10 that came from devices such as cell phones or other devices  
11 like computers. Those files, while they may only receive a  
12 single Bates number, are highly voluminous because, for  
13 instance, it could be a spreadsheet containing tens of  
14 thousands of checks.

15 So that's where the government's production in terms  
16 of volume stands today. To give you a sense of what's been  
17 produced and what's yet to come, I'll just run through a few  
18 categories.

19 So the government has executed and produced 14 search  
20 warrants over the course of the case. There are two more that  
21 are being produced to the defendants shortly. In total, 14 of  
22 16 of those search warrants relate to premises, accounts, or  
23 devices that belong to the defendants, which I think is  
24 relevant in terms of thinking about potential motion practice  
25 in this case. So they have almost all the applications.

K23HPARC

1 They'll have the rest of them very shortly, those ones that  
2 just happened recently.

3 In terms of the materials that were seized pursuant to  
4 those warrants, all the materials that were used to charge the  
5 case, that came out of either email or iCloud search warrants  
6 executed before the case was charged have been produced.

7 There's still sort of what I describe as dribs and drabs from  
8 those accounts, whether it's attachments that are still being  
9 processed and turned over or residual amount of emails that are  
10 still being cut through. But, basically, everything that was  
11 used to charge the case is now in the defense's possession.

12 The government also since the last conference has  
13 produced a large volume of materials that were seized that were  
14 not in the government's possession prior to charging. So, for  
15 instance, all of the paper records that were seized from the  
16 defendants have been produced. There's been a partial  
17 production of defendant Parnas' iPhone, the responsive -- so  
18 just be clear. I'll back up for a second.

19 We've produced everything in the extracted form to  
20 each of the defendants. Only basically the owner of the  
21 account gets their full account or their full iPhone as soon as  
22 it's been extracted. So all of those extractions have been  
23 produced in their entirety to the individual owner. The  
24 government now in -- what remains in discovery are the  
25 materials that are being reviewed for responsiveness, and then



K23HPARC

1 that responsive set or the identified set is being produced to  
2 all the defendants in discovery. So the government's already  
3 made a substantial production of the identified set, and what  
4 remains in discovery and what the government anticipates doing  
5 is producing what's outstanding, what's still either going  
6 through a privilege review or the government's responsiveness  
7 review.

8 So just to give your Honor a sense of things, we  
9 submitted a letter last week that said we expect discovery, or  
10 at least the vast majority of discovery, to be completed by  
11 mid-March. I think that deadline still holds. Our filter team  
12 is working through a few more devices and extractions, but they  
13 have gone through the majority of them to date. And in terms  
14 of the identification responsiveness review, there's also been  
15 a substantial amount of progress, and we expect by that  
16 deadline we indicated in the letter that everything should be  
17 done. Of course, there's always the possibility an additional  
18 subpoena return comes in or there are additional materials that  
19 are being extracted off of a device, but for all intents and  
20 purposes, the vast majority of discovery will be done by that  
21 deadline.

22 The one other thing I want to flag just for everyone's  
23 purposes is that, as we've indicated previously, there are  
24 multiple electronic devices that were seized that the  
25 government is still working to extract because there are --

K23HPARC

1 those passwords have not been provided for them. And so, for  
2 instance, there are eight devices belonging to defendant  
3 Parnas, ten devices belonging to defendant Fruman, and two  
4 devices belonging to defendant Correia, all of which have not  
5 either been extracted at all or at least only have a partial  
6 extraction.

7           The FBI continues to work diligently to complete or  
8 successfully extract any data from those. Obviously, the  
9 government is working to, as soon as an extraction happens,  
10 send it through a filter review and then on in discovery after  
11 responsiveness review, but it's possible, for instance, an  
12 iPhone could be cracked in June and then the government would  
13 need to do additional filter and responsiveness review at that  
14 time.

15           THE COURT: Have you had further communications about  
16 being provided passwords?

17           MR. ROOS: Your Honor asked that question at the  
18 December conference, and later that day or the next day, among  
19 a number of queries to defense counsel, we invited them to  
20 provide passwords. But we're where we are right now in terms  
21 of the -- I think it's a total of 16 devices.

22           THE COURT: So can you give me a sense -- I know  
23 you've said mid-March for, essentially, completion of  
24 discovery -- of the responsive materials, what portion have you  
25 been provided as opposed to still waiting on the filter team or

K23HPARC

1 whatever?

2 MR. ROOS: So in terms of what existed prior to the  
3 charging of the case, so the pre-October process, that has  
4 basically all been produced. Like I've said, there are, I  
5 think, some attachments to some of the text messages that  
6 include multimedia that are still being produced. There may be  
7 a small subset of the email accounts that we're still doing or  
8 finalizing review, but everything that was used to charge the  
9 case has been produced and identified and turned over.

10 Then there's also been some of -- a good deal of the  
11 materials that have since been extracted, filter reviewed, and  
12 identified, and those were also turned over in a recent  
13 discovery production. In terms of what's left, really the only  
14 residual sort of remaining discovery besides a subpoena return  
15 here or there is the subset of material that is still going  
16 through a filter and responsiveness review.

17 If your Honor has specific questions about devices or  
18 who they belong to and what they are, I'm happy to answer them.

19 THE COURT: How many have you not been able to crack,  
20 as you put it?

21 MR. ROOS: So it's eight plus ten plus two, so 20  
22 devices total across three defendants.

23 THE COURT: That have not been accessed?

24 MR. ROOS: Correct, have not been accessed.

25 THE COURT: How many have?

K23HPARC

1 MR. ROOS: Well, it's a little bit of a complex  
2 question because of the way -- particularly where our Internet  
3 service providers produced data. So, for instance, if an  
4 iCloud account, if a warrant is executed on a defendant's  
5 iCloud account and Apple turns over the records, it may include  
6 actually what's the equivalent of five devices, so if the user  
7 backed up three different iPhones or an iPad. So the  
8 government is actually through, I believe, over 50 either  
9 accounts or devices, not all of which have gone through filter  
10 review, although they're very far along. And the  
11 responsiveness review is, I would say, generally just days  
12 behind where the filter review is.

13 So we are through a large volume. In particular, like  
14 I said, I think the materials that are most relevant in terms  
15 of the charges have been produced. We tried to prioritize them  
16 so all defense can see them and think about their motion  
17 practice, and I'm confident that the remainder -- of course,  
18 subject to a few exceptions here and there -- should be  
19 processed by the deadline we previously indicated to the Court.

20 THE COURT: OK. Do you have any update on any  
21 possibility of a superseding indictment, the likelihood of  
22 that, the timing of that?

23 MR. ROOS: I think the government's position, as we  
24 indicated in our prior conference on a superseder has changed.  
25 In terms of decision on that, we're still evaluating it. We've

K23HPARC

1 had some discussions with defense counsel about what their  
2 preference would be for a motion schedule and a trial date, and  
3 the government's aware of the general practice of when it's  
4 appropriate to bring a superseder relevant to those dates and  
5 will keep all that in mind when making its decision.

6 THE COURT: Thank you.

7 I guess next I'd like to hear from defendants about  
8 your progress in reviewing discovery and whether you know at  
9 this point whether you anticipate filing any pretrial motions  
10 and what you have in mind in terms of schedule for pretrial  
11 motions. If anyone wants to tell me where you are on  
12 discussing a trial date as well, you're welcome to do that,  
13 whoever wants to start.

14 MR. LEFCOURT: Your Honor, just to back up a speck, so  
15 20, 25 years ago, pre-digital world, we would have this  
16 discovery conference at some point with the Court, and the  
17 government would tell us they know their *Brady* obligations and  
18 that they would provide us probably with some fat files a month  
19 before the trial date and whatever recordings, and that's it.  
20 Things have remained the same from the government's point of  
21 view. They're going to turn over everything, they're not going  
22 to identify what the relevance is of any particular piece, and  
23 we're left in the dark.

24 As I indicated at the last conference in December,  
25 there's a new discovery rule, 16.1. It was passed and debated

K23HPARC

1 for years and became law in December. It wants to go into the  
2 digital world. It seems to us, and we've all discussed this,  
3 that without a draft exhibit list, a preliminary exhibit list,  
4 we are just in a fog. Where do you go? What is it that is  
5 really relevant to this case? On the other hand, if we have an  
6 exhibit list and we know they're offering these checks or these  
7 emails, or what have you, we would at least be focused on what  
8 we have to look for and look into.

9 This situation is really -- there's no question here.  
10 A terabyte, I googled this morning, and in layman's terms, a  
11 terabyte is 200,000 five-minute songs or 500 hours' worth of  
12 movies. That's the kind of volume of one terabyte. We have  
13 supplied the government with three terabyte drives, one of  
14 which they gave us back just now before the Court proceeded.  
15 In order to have any rational way to look at this stuff, we  
16 need a way to do that, and one step is a draft exhibit list  
17 that they're not bound by, that they could amend, that they  
18 could add or subtract, but really, there's just no way for us  
19 to go.

20 In terms of a motion and trial schedule, we discussed  
21 it amongst ourselves. If we're really going to be finished  
22 with discovery, then we ought to talk mid-March if that's real,  
23 because things keep dripping in. Maybe a May 1 motion schedule  
24 and a trial date in October. That's what the defense had  
25 proposed to the government. I think that the government said

K23HPARC

1 August. So that's what we would suggest, your Honor.

2 THE COURT: OK. Before I turn it back to the  
3 government, if any other defense counsel wants to clarify their  
4 own position on that or agree with Mr. Lefcourt or add anything  
5 else, then I'll have the government respond.

6 MR. BONDY: Your Honor, we agree with Mr. Lefcourt. I  
7 would note for the Court that many of the files that we're  
8 receiving are exceptionally large. I have one file that's 171  
9 gigabytes, and I've bought several new computers with  
10 additional RAM and had to run the most recent, biggest RAM  
11 under an air conditioner to keep my processor from overheating  
12 simply so I can try to open some of the midsize files.

13 THE COURT: These are files of extractions of your  
14 client's --

15 MR. BONDY: Yes.

16 THE COURT: -- own devices?

17 MR. BONDY: Exactly.

18 THE COURT: They should be things with which he's  
19 familiar.

20 MR. BONDY: Well, yes, but it's 171 gigabytes just for  
21 me to be able to open it and confirm that indeed these are the  
22 things he's familiar with, and that's just one example. I  
23 don't know. I had asked the government if they could provide  
24 us with PDFs of these extractions, because on a Cellebrite  
25 extraction program, you click the button, and you can generate

K23HPARC

1 the PDF report, which is not as interactive but a lot easier to  
2 work with. They declined to do so.

3 To the extent the government can make all of our lives  
4 easier by trying to give us these extractions in a simpler  
5 format to work with, I would ask that they do so.

6 THE COURT: Anyone else?

7 MR. BLANCHE: I don't have anything to add, your  
8 Honor.

9 MR. HARRINGTON: We concur with the proposed schedule.

10 THE COURT: Mr. Roos, did you want to respond to a  
11 couple of things: One, the suggestion that you, I guess, under  
12 Rule 16.1 do something additional to help them focus on the  
13 relevant crucial documents, including possibly some sort of  
14 initial draft exhibit list; and then, second, Mr. Bondy's  
15 suggestion about the format of production; and then, third, I  
16 guess the idea of a May 1 motion schedule and October trial  
17 date?

18 MR. ROOS: Certainly, your Honor. So I believe your  
19 Honor took somewhat extensive argument on this question about  
20 the proposed draft exhibit list and the new Rule 16 at the last  
21 conference, and I'm happy to revisit those arguments to  
22 whatever degree your Honor wants.

23 But to just summarize a few of the most salient  
24 points, I think there's a speaking indictment that outlines the  
25 charges and gives more than ample notice to each of the



K23HPARC

1 defendants of what exactly they're charged with. There are, as  
2 I said, 14 search warrants that are quite lengthy in terms of  
3 their affidavits, sometimes close to 100 pages that quote  
4 verbatim the emails and text messages that form the basis for,  
5 first, the probable cause in the search warrants and for some  
6 of the later search warrants, in fact note the defendant's  
7 already been indicted and then describe the factual bases for  
8 the defendant's charge. So as we said at the last conference,  
9 that should be the guide.

10 The defendants also have all of the responsive  
11 materials that were cited in those search warrants before the  
12 case was charged. So, literally, they take the search  
13 warrants, that's the guide; read the relevant text messages,  
14 which should be some of the most salient evidence against their  
15 clients; they could also then find those text messages and  
16 emails in the responsive materials that have been produced.  
17 So --

18 THE COURT: Let me just interrupt you there. Is it  
19 simple enough -- I agree with you that the indictment is  
20 relatively detailed, and I think the search warrant and  
21 affidavit information is also pretty detailed. Is it easy  
22 enough when they're given a terabyte of data to find a  
23 particular email from the responsive materials the government  
24 has produced?

25 MR. ROOS: Well, on that question, your Honor, so with

K23HPARC

1 every discovery production we provide an index that indicates  
2 where the materials are. There are Bates ranges. For the  
3 responsive materials that, for instance, text messages, there's  
4 all sorts of identifying information you could control-F some  
5 of the words in the text message. You could sort the data by  
6 date or by recipients and find all those chats, and so --

7 THE COURT: So it is sortable by date?

8 MR. ROOS: It's sortable by date, yes.

9 THE COURT: The way it's produced?

10 MR. ROOS: The way it's produced.

11 THE COURT: OK.

12 MR. ROOS: So I think that's the answer. I don't  
13 think the rule contemplates providing early exhibit lists, and  
14 frankly, not only would that be, I think, an unprecedented and  
15 not legally supported request, but also I don't think it would  
16 do a lot of good at this stage when we are months away from at  
17 least the trial date that's proposed by defense counsel. What  
18 they need to be thinking about in terms of motions and  
19 preparing for a potential trial is in the discovery generally  
20 but also specifically in the indictment and the search warrant.

21 Now, I think Mr. Bondy has a very different type of  
22 question which relates to the full extractions that we're  
23 giving to each of the defendants individually of their own  
24 devices. So this is not material that has been deemed the  
25 discovery that will be used by the government in its case.

K23HPARC

1 It's just the mirror copy we're providing to each of the  
2 defendants individually. And so in terms of review, I think  
3 your Honor's absolutely right that the defendants should know  
4 what's on their own devices, and it really sounds like it's a  
5 technical issue for Mr. Bondy, whether it's the strength of his  
6 computer or the air conditioner that goes with it.

7 In terms of what the government's doing, once we've  
8 produced the copy or the image to the defense counsel, we are  
9 then doing our filter and our responsiveness review, and they  
10 will get, ultimately, the responsive materials. And because  
11 that's a smaller subset, the file sizes are also considerably  
12 smaller. So I think that's more of a technical issue. The  
13 PDFs to get to the specifics, I don't think are really a  
14 workable solution, and in any event, I think the government's  
15 fully complied with its discovery obligations, particularly  
16 what's really a courtesy to just produce these full images  
17 before we've even gone through them.

18 As to the, I guess, third question your Honor posed,  
19 motion schedule and trial date, as Mr. Lefcourt alluded to, the  
20 government proposed an August date. We think for a motion  
21 schedule in May, August -- and when the case was charged,  
22 August would certainly be appropriate. The government, of  
23 course, is ready to try the case whenever the Court determines  
24 is appropriate. I would note defense counsel indicated to us  
25 that they don't want to do August because of the volume of

K23HPARC

1 discovery, the possibility of a superseding indictment, and  
2 other scheduling conflicts, so we would just leave it to the  
3 Court, then.

4 THE COURT: OK. But you could do October?

5 MR. ROOS: We could do October. August, we think, is  
6 appropriate due to the schedule, but we can do whenever the  
7 Court agrees is appropriate.

8 THE COURT: Assuming I agree with them to put it in  
9 October as a trial date, would May 1 be reasonable for a motion  
10 schedule?

11 MR. ROOS: That's fine.

12 THE COURT: All right. It sounds to me defendants  
13 would prefer October to August. Let me see if anyone disagrees  
14 with that. It looks like everyone agrees.

15 Let's start with the trial date, because I really want  
16 to get that on the schedule so everyone can plan around it. I  
17 think I'll go ahead and schedule that in October. What is the  
18 government's latest prediction of the number of trial days?

19 MR. ROOS: Certainly a lot of variables that could go  
20 into that. I guess I would say two weeks, although with four  
21 defendants, as your Honor knows, jury selection takes longer,  
22 there are multiple openings, there are -- could be up to four  
23 crosses of every witness. There, of course, remains the  
24 possibility of a superseding indictment. So I think, while the  
25 current estimate might be two weeks, it probably makes sense to

K23HPARC

1 at least block off on the Court's calendar additional time in  
2 case things change. It certainly could be shorter also. It  
3 could be a one-defendant case with a narrow set of issues.  
4 Sorry I can't be more helpful in terms of timing. Given we're  
5 talking about October and we're here in the beginning of  
6 February, there are a number of factors that go either way in  
7 terms of how the case comes down.

8 THE COURT: Fair enough. I think we should definitely  
9 put two weeks. I think we should probably put three weeks on  
10 the calendar just to be safe.

11 Does anybody think that's not enough? I don't see any  
12 objections. So looking at October, I just want to make sure  
13 that we avoid any holidays. We could do October 5. I know the  
14 holiday of Sukkoth is the weekend before, begins Friday, the  
15 2nd. I'm not sure if October 5 is a workday or not. We could  
16 either do October 5 or October 13, which is the day after  
17 Columbus Day the following week. We could start either of  
18 those, I believe.

19 MR. LEFCOURT: Either is fine with us, your Honor.

20 MR. BLANCHE: Either's fine.

21 MR. BONDY: Either's fine, your Honor.

22 THE COURT: So October 5 looks OK.

23 MR. BLANCHE: Yes.

24 THE COURT: Let's go ahead and put it down for  
25 October 5. Jury selection beginning October 5 at 9:30 a.m. On

K23HPARC

1 motions, I think May 1 sounds fine. Actually, May 1 is a --  
2 oh, yes, that's a Friday. We can do May 1.

3 How long would the government like to respond?

4 MR. ROOS: Three weeks.

5 THE COURT: All right. Responses will be due May 22.  
6 And I don't know if you wanted to do reply briefs.

7 MR. BONDY: Yes, your Honor, please.

8 THE COURT: How long would you like for that?

9 MR. BONDY: Two weeks.

10 THE COURT: All right. That would be June 5. May 1  
11 for motions, May 22 for responses, and May -- June 5 for any  
12 reply briefs.

13 Then I am persuaded by the government that I don't  
14 think there's any basis to require an expedited set of exhibits  
15 or anything like that. I do think the parties should confer.  
16 I think Rule 16.1 does contemplate conferences to address the  
17 complexities of discovery. So I want you to confer, and if  
18 there are problems, I'm open to trying to knock some heads.

19 MR. LEFCOURT: Your Honor, can I take just one more  
20 chance?

21 THE COURT: Sure, sure.

22 MR. LEFCOURT: The government says the indictment is  
23 clear as to what the charges are and it's a speaking indictment  
24 and there are search warrant affidavits from which we can  
25 understand what the case is, but there are three terabytes of

K23HPARC

1 information. Are they saying we shouldn't look at that other  
2 material, or how long that would take us to look at that  
3 material? I didn't hear any statement of prejudice, that they  
4 would in any way be prejudiced by a preliminary exhibit list so  
5 that we could be focused, because it is impossible to review  
6 three terabytes of information. So you have to be focused.  
7 They want to focus us with what's in the indictment or what's  
8 in the search warrant. I think all of us would be more  
9 comfortable in understanding what kind of exhibits we were --  
10 and this is not unusual. Judge Kaplan has given 3500 material  
11 in the KPMG case eight months before trial; other judges have  
12 done other things. We're dealing with a lot of material. It  
13 just is unreasonable.

14 THE COURT: But this is an indictment where the  
15 evidence is essentially laid out in the indictment and in the  
16 search warrants and the affidavits. It says email on this date  
17 from so-and-so to so-and-so, and you can search for it in the  
18 documents produced. The terabytes are a lot of stuff just  
19 extracted from your client's phone, and as to that, there's no  
20 reason to think it's necessarily going to be used. It's mostly  
21 irrelevant information.

22 MR. LEFCOURT: That's the whole point. Is it going to  
23 be used? Is it relevant to anything? Should we look at it?  
24 How would you make that determination, your Honor, with all due  
25 respect? You have three terabytes of information. You know

K23HPARC

1 what's emailed -- emails are in a search warrant affidavit.

2 You might know what the indictment says. Now you have all this  
3 other material. Don't look at it? Focus on what? It's really  
4 untenable and it's inappropriate and there's no prejudice.

5 THE COURT: OK. Mr. Roos, why shouldn't you provide  
6 some sort of preliminary exhibit list that you're not  
7 necessarily bound to?

8 MR. ROOS: Well, first of all, your Honor, my  
9 colleague, Mr. Zolkind at the last conference back in December  
10 offered, on this exact issue, if there are questions or ways we  
11 can help defense counsel navigate the discovery, we're  
12 certainly open to and will engage in that type of conference  
13 that's not contemplated by the rule. I don't believe that  
14 Mr. Kukushkin's counsel's taken us up on that. We're surely  
15 willing to have that type of dialogue if we can help focus them  
16 on particular discovery.

17 I would say in this case, particularly as to this  
18 defendant, you have charged a conspiracy to have a foreign  
19 national make an unlawful or set of unlawful political  
20 contributions. Really, it's about a conspiracy, so  
21 communications between individuals and the flow of money. So I  
22 think there's actually a simplicity to it and it should be  
23 easy, particularly with the indexes and all the warrants,  
24 including warrants for devices and accounts belonging to that  
25 particular defendant. So it's really a roadmap to work through



K23HPARC

1 those issues.

2 Now, what's the prejudice potentially to the  
3 government? Solely premature, it's not contemplated by any  
4 rule, things may change and develop, and gives an insight and,  
5 frankly, may skew things in a direction that don't ultimately  
6 manifest later on in October. So I think there's a reason why  
7 this is not contemplated in the rules, why it's not a practice  
8 that's done in other cases.

9 I think the best approach here would be for defense  
10 counsel to review the indictment and the warrant applications;  
11 engage with us if they have specific questions. We will always  
12 be happy to point them to the Bates ranges. If they're saying,  
13 where are the chats that are referenced in this particular  
14 warrant? We're more than happy to identify the Bates range.  
15 The same goes for financial documents.

16 THE COURT: I think they want more than that. They  
17 want to know, of three terabytes, what am I supposed to focus  
18 on?

19 MR. ROOS: I think your Honor is correct in terms of a  
20 large volume of that -- by the way, because it's a terabyte  
21 hard drive doesn't mean we filled it. We just ask for that  
22 amount because we may fill above what is 24, 64 gigabytes.

23 In terms of what is the largest uses of volume on  
24 those drives, it is the mirror image of electronic devices.  
25 They certainly have the right and the reason why we've provided

K23HPARC

1 those mirror images when they do is that way they can work with  
2 their client's materials, but if they choose, they can just  
3 wait for the government to produce what we've identified as the  
4 responsive set, which is certainly going to be considerably  
5 smaller. They either have it already or they're going to get  
6 it in the next month. And that could be a way in which, in  
7 trying to navigate those electronic documents, they can work  
8 through them.

9 So I just don't see this argument that it's -- I think  
10 it's so voluminous is really a red herring designed to try to  
11 get an order that really is not contemplated by the rule. It's  
12 very different from early 3500 material, especially where we  
13 have a case that's estimated for two to three weeks that's set  
14 for October.

15 THE COURT: What do you mean when you say the  
16 responsive material? Are you providing that in a different way  
17 under an identification as responsive?

18 MR. ROOS: Exactly, your Honor. So, basically, to use  
19 an analogy, when FBI agents go into a premises, a home, with a  
20 warrant to look for evidence of specified campaign finance  
21 violations, because that's what it says, they seize items that  
22 are specified in the warrant, evidence of financial movements  
23 from a foreign country relating to a political expense or  
24 evidence of communications between coconspirators. When an  
25 electronic service provider produces records, they're producing

K23HPARC

1 for a temporal period the entirety of the records for a  
2 particular account. The government's warrant calls for the  
3 seizure of only those materials that are responsive to the  
4 warrant.

5 So what the government does, after a filter review has  
6 happened, is we review the electronic materials and only seize  
7 those materials that are responsive, meaning they match up on  
8 one of the categories of the warrant. So, conceivably, there  
9 could be an email account that is a terabyte full of data for  
10 Mr. Kukushkin, but the chats between him and Parnas, Fruman,  
11 and Correia are only a single megabyte. That could be the  
12 volume ultimately seized from the account and produced as  
13 discovery and used at the trial. When you use those big  
14 numbers of, oh, the account is a terabyte or the device is a  
15 terabyte, it doesn't really reflect what's at issue. We're  
16 just giving them a copy of what their phone looks like because  
17 we're not giving the phone back.

18 THE COURT: But then are you giving them a separate  
19 category and saying this is responsive to this?

20 MR. ROOS: So what does that look like?

21 THE COURT: Yes. How are you providing that?

22 MR. ROOS: For instance, for emails, they're produced  
23 with an electronic load. So it's basically the images or the  
24 PDFs of the emails with a Bates stamp on them, and they have an  
25 electronic load file that goes into them. You can load them

K23HPARC

1 into Relativity or Concordance. For text messages, we have  
2 been producing them in Excel spreadsheets, only those that have  
3 been seized or identified responsive with an accompanying  
4 folder that contains the attachments in their native form so  
5 you can read the chats on the spreadsheet and then say, Oh, I'm  
6 interested in that attachment, and look at the folder.

7 THE COURT: So some of that's been produced. You're  
8 still producing some of the attachments and other information?

9 MR. ROOS: Right. So, for instance, if someone were  
10 to image my phone and pull off all of the textual material, you  
11 would probably get three spreadsheets: My chats, my SMS, and my  
12 text messages. The government then produces just those subsets  
13 that are responsive to the warrant or seized, and so the  
14 defendants will get for each phone likely something like three  
15 spreadsheets which will have each of those types of textual  
16 material.

17 THE COURT: If that's what it is, I don't see why the  
18 fact that there's three terabytes of mostly extractions from  
19 your own devices, why that should be used as a reason to make  
20 them do more than what the law requires, which is to provide  
21 responsive documents under Rule 16.

22 MR. LEFCOURT: I'm not sure the law doesn't require  
23 it. Rule 16.1 is a plan. That contemplates a plan so that the  
24 defendants will be given the proper discovery in a timely way  
25 and usable way. I don't think that it's not contemplated. It

K23HPARC

1 is contemplated. What's the prejudice? They just don't want  
2 to do it. Why? I mean, the fact that they don't want to do it  
3 is -- what are they thinking? That we're going to learn  
4 something more about the case that will help us get prepared?  
5 Oh, how terrible.

6 THE COURT: Well, I don't see why you're not getting  
7 plenty of information by getting the responsive documents and  
8 the detailed information in the warrants and affidavits and the  
9 indictment. I think it's adequate.

10 So do we need to have a conference at some point  
11 between now and -- either between now and May or between now  
12 and, obviously, some point in summer or fall before the trial  
13 date? What do you all think?

14 MR. BONDY: I think we do. I think we should have a  
15 conference after the discovery that is anticipated being closed  
16 in March has been produced.

17 THE COURT: So maybe April?

18 MR. BONDY: Yes.

19 MR. ROOS: On that, your Honor, I mean, we're always  
20 happy to come see you. We're right next door. I think we  
21 certainly could show up for a conference. If it's just a  
22 question of has discovery been, for all intents and purposes,  
23 completed, that's something we could also just put forth in a  
24 letter. I think it certainly makes sense to have a conference  
25 at some point likely after the motions are filed to set a

K23HPARC

1 pretrial schedule, like motions in limine, voir dire, requests  
2 to charge, a final conference date. We'd defer to you if you  
3 think it makes sense to have another check-in in a month or  
4 two.

5 THE COURT: I'm open to having something in April.  
6 I'm also open to having something in, say, July where we would  
7 set pretrial dates. What do you all think?

8 MR. BONDY: Could we set both? If we don't need an  
9 April conference, we can let the Court know we don't need a  
10 conference.

11 THE COURT: What do you all think?

12 MR. BLANCHE: That's fine, your Honor. Seems like  
13 July is more appropriate after motions are filed, but if we  
14 need one in April, fine.

15 THE COURT: OK.

16 MR. HARRINGTON: I agree, Judge, unless something  
17 comes up, we probably won't need an April conference date, but  
18 if something should could come up, there's obviously a lot of  
19 moving pieces here. So I'd put it down or just have us request  
20 it if we feel we need it. End up at the same place.

21 MR. LEFCOURT: Whatever, your Honor.

22 THE COURT: I'll set it down for July, and then if  
23 there's any need to come in in April, just send me a letter in  
24 advance, and I'll bring you in.

25 How is July 17, Friday, July 17?

K23HPARC

1 MR. LEFCOURT: Could we make it that Thursday instead?

2 THE COURT: Sure.

3 MR. HARRINGTON: That's great, your Honor.

4 THE COURT: July 16, 2:30 p.m.

5 MR. LEFCOURT: Good.

6 THE COURT: All right. Next conference will be  
7 July 16, 2020, at 2:30 p.m. We'll let you know if it's going  
8 to be in this courtroom or a different courtroom.

9 Let me ask if there's anything else anybody wanted to  
10 address at this point?

11 MR. ROOS: If there's nothing else from defense  
12 counsel, the government would move to exclude time between now  
13 and the trial date which is scheduled for October 5, 2020, so  
14 that the defendants have ample time to review discovery and  
15 make any pretrial motions, the government can oppose those  
16 motions, and the parties can discuss a disposition, if  
17 necessary, and prepare for trial.

18 THE COURT: Any objection, Mr. Bondy?

19 MR. BONDY: No, your Honor.

20 THE COURT: Mr. Blanche?

21 MR. BLANCHE: No, your Honor.

22 THE COURT: Mr. Harrington?

23 MR. HARRINGTON: No, Judge.

24 THE COURT: Mr. Lefcourt?

25 MR. LEFCOURT: No, your Honor.

K23HPARC

1           THE COURT: All right. I grant the application, and I  
2 exclude time under the Speedy Trial Act from today's date  
3 through October 5, 2020. I find the ends of justice outweigh  
4 the interests of the public and each of the defendants in a  
5 speedy trial for the reasons stated by counsel for the  
6 government.

7           Anything else for today?

8           MR. BONDY: No, your Honor.

9           THE COURT: Thanks, everybody. We're adjourned.

10          (Adjourned)